



BIDEN'S PARDONS: THE FIRST DROPS IN A BIG BUCKET OF CRIMINAL REFORM

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By Stacy Caplow □

President Biden pardoned thousands of United States citizens and lawful permanent residents who committed or were convicted in federal courts of simple marijuana possession since 1992, and even earlier if those records can be located. This is a record number of mass pardons since Vietnam draft resisters were pardoned by President Carter in 1977. Predictably, no one is totally satisfied with this announcement. The right quickly denounced Pres. Biden for being soft on criminals; criminal and immigration advocates consider these pardons to be a good start but only a small step in addressing in the unforgiving wave of over-criminalization over the past 30 years that affected so many.

While these new pardons acknowledge the racism inherent in these arrests and convictions—it's good to express this-- they also are reacting to the wave of marijuana decriminalization initiatives in almost 50% of the states where some form of marijuana use and possession has been essentially legalized. but these pardons do not affect individuals convicted of marijuana possession in state courts. Recently, Brooklyn District Attorney dismissed over 3,500 pending marijuana cases in light of New York State's new legislation.

Marijuana possession is a small corner of the universe of people who have been arrested, prosecuted, and incarcerated for crimes that stem from poverty and its attendant social problems. And, largely forgotten in this multitude of people caught in the net of the war on crime are the many noncitizens facing deportation for a single, often long-ago crime. Marijuana, in particular, justified many police stops and arrests, often the first step in many more intrusions by the criminal legal system, and for some, to eventual removal proceedings.

The consequences of any conviction do not stop in the criminal courts. Particularly harsh deportation laws enacted in the late 1990s made it almost impossible for either criminal or immigration courts to recognize any form of rehabilitation, family or community factors, physical or mental health, the context in which a crime was committed or even its age. Even convictions that carry no prison sentence or that have been vacated or expunged cannot forestall deportation. When a citizen's criminal case and sentence is over, they return to their communities—often burdened by civil disabilities which clearly make getting work, finding housing, securing credit, and often voting exponentially difficult. Noncitizens are sentenced twice—they are placed in removal proceedings, often moving directly from prison to immigration detention, a difference in location but not in conditions of confinement. Sometimes, they are put into removal proceedings years later but languish in detention their cases drag on. Their life had been back on track and then they are whisked into the horrible world of immigration detention where, for example, one of our clients, a young mother of three who came to the U.S. as a refugee, was so medically mistreated that she almost died from sickle cell disease. The destabilizing threat of deportation hangs over their heads for years.

The Immigration and Nationality Act does contain one surprisingly generous provision: a full, unconditional Executive pardon is a waiver of deportation for most criminal convictions. Assuming there is no other basis for deportation, removal proceedings would be terminated because of the pardon. For the lawful permanent resident, this means restoration of that status. For others, it may provide an opportunity to gain some form of status.

The Clemency & Pardon Project of Brooklyn Law School is a clinical program in which students file pardon applications on behalf of individuals facing removal to federal and State pardon authorities. Our clients, most of whom came to this country as lawful immigrants decades ago, generally have been convicted of a single crime that renders them deportable. These convictions may have occurred 10, 20 or even 30 years ago. Our clients are parents of U.S. citizens who often have health or mental health problems. Our clients work hard to support their children, have extended families and solid community ties in the United States.

Our harsh immigration laws bar our clients from immigration relief because of their single conviction. So, we file applications in the hope that a pardon,

operating as a waiver of deportation for some crimes, will allow them to remain in the U.S. For example, we filed federal pardon applications in early 2022 on behalf of two women both of whom have been longtime lawful permanent residents—one came as a refugee, the other gained status as a result of an abusive marriage. Both come from countries riven by violence, corruption, and social disorder. They essentially were “drug mules” at a time in their lives when they were desperate for money to support their families. They were convicted in federal court. They completed their sentences and their post-release supervision. Then, they were detained by I.C.E. and placed in removal proceedings. Ultimately, they were released. While neither has been deported yet, their pardon applications are pending along with thousands of others. So far, according to the U.S. Office of the Pardon Attorney, only three pardons have been granted during the Biden administration while 3,357 applications are pending.

Our other clients, mostly in New York State, face similar odds and are equally deserving of the kind of justice-correction that pardons accomplish. One of our clients whose case is pending in the New York State Executive Clemency Bureau came to the U.S. as a child of a refugee, and on the verge of starting college, played a minor role in an armed robbery. He was just over the age limit for Youthful Offender treatment which would have prevented deportation. He served a hefty sentence but while in prison he earned a boxful of certificates. Then, upon release, went to college, earning a B.A. with distinction. He married and became a father of a son who is autistic. He survived the pandemic as a food deliverer and finally just got a full-time job.

My students, their immigration lawyers and I cannot find a single reason aside from their conviction to justify their deportation. We have more examples of people equally deserving of a pardon. Our students work hard to paint a detailed portrait of our clients to make sure that anyone reading the application truly understands the full person, their life circumstances, and the impact of deportation on their families, employers, communities and themselves.

Recently, the Governor of Oregon, Kate Brown, granted clemency, including pardons, to 73 people. This most recent spate of clemency follows earlier grants and is a manifestation of Governor Brown’s efforts to respond to mass incarceration by performing “acts of mercy.” This remarkable record addresses the social costs of our punitive society, but it takes courage and conviction to

act this boldly. Other governors have been a bit active in the clemency/pardon space, including former NY State Governor David Patterson, but none have specifically targeted productive, rehabilitated noncitizen offenders for particular attention.

President Biden acted decisively, if not as radically as he might have. Now that he has tested the waters of mercy, he can use his powers even more generously and set an even stronger example to governors. Pardon power is absolute. When its exercised cravenly, as during the Trump years, it seems corrupt. But it also is a tool for redressing injustice. There are nails everywhere; use that hammer.

Guest Author Professor Stacy Caplow teaches the Clemency & Pardon Project at Brooklyn Law School as well as Immigration and Criminal Law.